2042

No. 481

Office Supreme Court U. S.
FILED
MAR 16 1900
JAMES H. MCKENNEY,
Clerk

Reply Brief of Baxter for Appt

Filed Mar. 16, 1900.

Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 481.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY, THE NORFOLK & WESTERN RAILROAD COMPANY et al., Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION, Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF

MR. BAXTER of Counsel for Appellants.

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REPLY BRIEF OF

ED. BAXTER of Counsel for Appellants.

Since the oral argument I have received a copy of a "Supplemental Brief in behalf of Appellee," and I respectfully request permission to file this as a reply brief in behalf of Appellants.

I.

THE LINE FROM THE EASTERN SEABOARD VIA CINCINNATI TO NASHVILLE AND THENCE TO CHATTANOOGA IS NOT INVOLVED IN THE ORDER OF THE COMMISSION.

See said supplemental brief p. 5.

The line from the Eastern seaboard, via Cincinnati to Nashville, and thence to Chattanooga, is composed, in part, of a por-

tion of the Louisville & Nashville Railroad, which extends from Cincinnati to Nashville, a distance of 295 miles.

Trans. p. 45.

The Louisville & Nashville Railroad Co., *in its character as owner of the road from Cincinnati to Nashville*, was not made a party to the petition filed by the Board of Trade of Chattanooga before the Commission (Trans. p. 9.), nor was it made a party to the petition filed by the Commission in the Circuit Court.

Trans. p. 2.

No complaint was made, in either petition, that the Louisville & Nashville R. R. Co. was guilty of any wrong in accepting such rates on Eastern traffic to Nashville, as would enable Nashville to compete with Louisville and Evansville.

There was no charge in either petition that the Louisville & Nashville R. R. Co., *in its character as owner of the road from Cincinnati to Nashville*, participates in the carriage of Eastern traffic through Chattanooga to Nashville, or that it has any voice in making the rates on Eastern traffic through Chattanooga to Nashville.

The only character in which the Louisville & Nashville R. R. Co. was made a party, and the only character in which any complaint was made against it, in either petition, was in its character as one of the two assignees of the lease of the Georgia Railroad, which runs from Atlanta to Augusta, Ga., and which does not reach either Chattanooga or Nashville.

Trans. p. 87.

The Georgia Railroad is only one of several links in a line from the Eastern Seaboard, through Charleston and Atlanta, to Chattanooga, and thence to Nashville. It does not and cannot participate in the carriage of traffic from the Eastern Seaboard, through Cincinnati, to either Nashville or Chattanooga.

II.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY DID NOT COME INTO THE CASE VOLUNTARILY.

Counsel, on page 6 of their supplemental brief, state that the Louisville & Nashville R. R. Co. "came in voluntarily and filed its answer," etc.

This statement is misleading.

The petition before the Commission was filed against the "Georgia Railroad" (Trans. p. 9.), and the petition in the Circuit Court was filed against the "Georgia Railroad Company." (Trans. p. 2.)

There is no such corporation as the "Georgia Railroad Company."

There is a corporation named the "Georgia Railroad & Banking Company," which owns a railroad extending from Atlanta to Augusta. Said railroad was leased to Wm. M. Wadley for 99 years; and he assigned the lease to the Louisville & Nashville R. R. Co. and the Central Railroad & Banking Company of Georgia, by whom said railroad was jointly operated under the trade name of the "Georgia Railroad."

The Louisville & Nashville R. R. Co. and the Central Railroad & Banking Company of Georgia, having been "sued by the name of the Georgia Railroad Company," in regard to the railroad between Atlanta and Augusta, filed their joint and several answer in the Circuit Court as assignees of the lease of said road.

Trans. p. 87.

The Louisville & Nashville R. R. Co. made no appearance in the case, except in its character as co-assignee of the lease of said Georgia Railroad. It made no appearance in its character as owner of the road between Cincinnati and Nashville. And the appearance which it made as co-assignee of the lease of the

Georgia Railroad was not "voluntary;" because it and its co-assignee were actually sued under their trade name of the "Georgia Railroad Company."

III.

The Eastern Rates via Cincinnati to Nashville are Not Attributable Solely to the Louisville & Nashville Railroad.

Counsel, on p. 7 of their supplemental brief, state that "it is admitted that the low rates by the line via Cincinnati to Nashville are attributable solely to the Louisville & Nashville Railroad."

This is an error.

On p. 64 *et seq.* of my original argument, I showed that the eastern rates via Cincinnati to Nashville are divided between the Trunk Line roads north of the Ohio River, and the Louisville & Nashville Railroad south of that river, in certain proportions; and that the Trunk Lines get $\frac{5}{7}$ of the total first-class rate. The low eastern rates, via Cincinnati to Nashville, are therefore attributable to the Trunk Lines in a much greater degree than they are attributable to the Louisville & Nashville Railroad Company.

IV.

The Louisville & Nashville R. R. Co. Would Not Violate the Third Section of the Act by Continuing to Accept Its Present Rates to Nashville.

Counsel, on p. 9 of their supplemental brief, say that "if the Louisville & Nashville Road should continue low rates to Nashville from Cincinnati, it would violate section 3 of the law in maintaining higher rates to Chattanooga, on the line via Augusta to Chattanooga."

The Commission reported that the Trunk Lines and the Louisville & Nashville Railroad "united in joint tariffs from Eastern points to Nashville long before the lines through Chattanooga engaged in the Nashville business;" and that "the acceptance of the rates so fixed by the rail lines via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic."

Trans. p. 49.

The proposition of counsel amounts, therefore, to this: That if the Louisville & Nashville R. R., and its Trunk Line connections north of the Ohio river, continue to charge the same rates as they were charging long before the lines through Chattanooga began to compete for Nashville traffic, the Louisville & Nashville R. R. Co. will violate the third section, unless it causes the rates to be reduced from the East, via Augusta, to Chattanooga, to the level of the Nashville rates.

The Louisville & Nashville R. R. Co. owns a majority of the stock of the Nashville, Chattanooga & St. Louis Ry.; the N., C. & St. L. Ry. operates the Western & Atlantic Railroad from Chattanooga to Atlanta; and the Louisville & Nashville R. R. Co. is one of the assignees of the lease of the Georgia Railroad extending from Atlanta to Augusta.

Assuming, though only for the sake of argument, that such interest as the Louisville & Nashville R. R. Co. has as a stockholder in the N., C. & St. L. Ry, and as co-assignee of the lease of the Georgia Railroad, gives it such power of control over the line of road between Chattanooga and Augusta as to make it responsible for the rates that are charged from Augusta to Chattanooga, it cannot be held responsible for the rates charged *from New York to Chattanooga*. It has no shadow of interest in the line between New York and Augusta; and yet that line must necessarily be consulted in fixing rates from New York, via Augusta, to Chattanooga.

If the Louisville & Nashville R. R. Co. owned a line from New York, via Augusta, to Chattanooga and Nashville, it might be held responsible for the relative adjustment of rates as between Chattanooga and Nashville.

But the Louisville & Nashville R. R. Co. has no interest in any line north of Cincinnati, nor in any line east of Augusta. It, therefore, can neither control the rates from New York, via Cincinnati, to Nashville, nor the rates from New York, via Augusta, to Chattanooga.

It is only where the same carrier controls the rates to both of the cities affected that it can be charged with undue preference between them under the third section.

4 I. C. Rep., p. 65; Eau Claire Board, etc., vs. C. M. & St. P. Ry. et al, 4th head note.

V.

The Commission Did Not Order the Chattanooga Rates to be Reduced.

Counsel, on p. 10 of their supplemental brief, say that the natural and proper mode of complying with the order is to reduce the Chattanooga rates.

Neither the Commission, nor the Circuit Court, nor the Court of Appeals, ordered any reduction whatever in the Chattanooga rates.

Trans. p. 57, 381, 393.

All three of said tribunals ordered that the Chattanooga rates shall not be higher than the Nashville rates, but neither of them ordered the equality of rates between those two cities to be effected by reducing the Chattanooga rates to the level of the Nashville rates.

On the contrary, the Commission said that "the allowance of the same rate to the shorter distance point (i. e., Chattanooga) might reduce their revenue (i. e., the revenue of the lines operating through Chattanooga) *below the limits of fair compensation.*"

Trans. p. 53, 54.

VI.

This Court Has No Power to Make a New Order Substantially Different From the Order Made by the Commission.

Counsel, on p. 14 of their supplemental brief, contend that this Court has the power "to change or modify the order" that was made by the Commission in this case.

In the case of I. C. C. vs. Detroit, G. H. & M. Ry. Co., it was said by Judge Severens in his dissenting opinion, as follows:

"The Court is not authorized to make any general order or decree upon the matters at large as they shall appear before it, but is given power simply to award its process if it judicially approves the order of the Commission. If it does not find it to have been warranted by law, its power and duty are at an end."

57 Fed. Rep., 1013, 1014.

He also used the following language: "But, as already said, the Court can make no new order. The order of the Commission stands or falls as made."

57 Fed. Rep., p. 1019.

See also 83 Fed. Rep., p. 267, Farmers' Loan & Trust Co. vs. N. P. Ry. Co.

The proposition thus announced by Judge Severens was affirmed by the U. S. Circuit Court of Appeals for the Sixth Circuit, in 74 Fed. Rep., p. 805. The fourteenth head note of the opinion of that Court is as follows:

"The power given to the courts to compel obedience to the 'lawful order' of the Commission, being special and statutory, is strictly limited to the power conferred; and consequently the courts can only grant or refuse compulsory obedience to the order, and have no authority to modify or change it."

74 Fed. Rep., p. 805, D. G. H. & M. Ry. Co. vs. I. C. C.

In the case of I. C. C. vs. D. L. & W. R. Co. et al., in the Circuit Court for the Northern District of New York, Wallace, Circuit Judge, in speaking of the power of the Circuit Court, said:

"The Court cannot substitute, for an order actually made, one such as the Commission might or should have made, or such as the Commission intended to, but failed to, make. This Court has no revisory power over the orders of the Commission. Its function in a proceeding like this is merely to inquire whether the respondents, the common carriers, have refused or neglected to perform any lawful order or requirement of the Commission. It cannot undertake to decide whether the respondents have violated one which the Commission might have lawfully made."

I. C. C. vs. D. L. & W. R. Co., 64 Fed. Rep., p. 723.

Counsel, on page 162 of their original argument, refer to the following language in the opinion of the Circuit Court in what is known as the "Social Circle case:"

"The Commission denies the power of this Court to hear the case upon any other issues, pleadings, or facts, than those presented to the Commission. It is claimed that the case is to be determined with reference to what the Interstate Commerce Commission had before it, and that no additional issues or questions should be raised, *or other evidence taken.* The language of the act of Congress does not support this contention. . . . This question may be considered, therefore, as settled, not only by the language of the act of Congress, but by authority, against the position assumed by counsel for the Commission."

I. C. C. vs. C. N. O. & T. P. Ry. Co, 56 Fed Rep., pp. 934, 935.

In the "Social Circle case," counsel for the Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in that case. The question with reference to which the language just quoted was used by the Court was whether the Circuit Court, in its ex-

amination into the legality of an order, as made by the Commission, was restricted to the pleadings and evidence used before the Commission, or could consider new and additional evidence taken for the first time in the Circuit Court.

Counsel, on page 163 of their original argument, quote the following language from the opinion of this Court in the case of Interstate Commerce Commission vs. Alabama Midland Railway et al., 168 U. S., p. 175, viz.:

"It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeal in such cases that they *are not restricted to the evidence adduced before the Commission*, nor to a consideration merely of the power of the Commission to make the particular order under question, but that *additional evidence may be put in by either party*, and that the duty of the Court is to decide, as a court of equity, upon the entire body of evidence."

It is as true of the "Alabama Midland case," as it is true of the "Social Circle case," that counsel for the Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in either of those cases. The question with reference to which the language above quoted was used by the Court in both cases, was, whether the Circuit Court, in its examination into the legality of an order as made by the Commission, was restricted to the pleadings and evidence used before the Commission, or could consider new and additional evidence taken for the first time in the Circuit Court.

Counsel, on p. 162 of their original argument, quote the following language from the opinion of Judge Sage in I. C. C. vs C. N. O. & T. P. Ry. Co. et al., known as the "Cincinnati and Chicago Freight Bureau cases," viz.:

"The Court is to sit as a court of equity, without the formal proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises. It is so provided in

section 16 of the act. The intention of Congress evidently was to vest in the Court a large discretion."

64 Fed. Rep. pp. 984, 985.

In those cases, counsel for Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in those cases. The question with reference to which the language above quoted was used by the Court, was whether the Circuit Court, in its examination into the legality of an order made by the Commission, could consider a transcript of the testimony taken before the Commission as a part of the record. See 64 Fed. Rep., p. 983. His Honor held that though the testimony taken before the Commission was not a part of the record, either party should be allowed to use as evidence any testimony taken before the Commission, which is competent and relevant. Such action was regarded by the Court as a proper exercise of the "large discretion" vested in it by the Act; and it was considered by the Court as doing "justice in the premises" to allow either party to use the testimony taken before the Commission, though it was not technically a part of the record. The question as to whether the Court had power to modify an order made by the Commission, or to make a new order of its own, was not discussed by counsel nor considered by the Court in those cases.

Counsel, on p. 163 of their original argument, quote the following language used by Judge Lurton in the case of Shinkle, Wilson & Kreis Co. vs. L. & N. R. R. Co. et al., 62 Fed. Rep., p. 693, viz.:

"If it shall then appear, on all the evidence heard and submitted, that the order of the Commission *was lawful* and reasonable, and that it has been violated, it shall be lawful for such Court to issue a writ of injunction, or other proper process, to prevent further disobedience of such order. Now, it is well settled that the Court is not the mere executioner of the orders of the Commission. The suit in this Court is an original and independent proceeding. This Court is not confined to a mere

examination of the matter as heard by the Commission. It proceeds to hear the complaint *de novo*."

In that case, counsel for the complainants did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in that case. The question with reference to which the language just quoted was used by the Court, was whether the Court was bound to issue a *preliminary* injunction to compel a carrier to obey an order made by the Commission in reference to freight rates, where the answer of the carrier denied that said rates were unreasonable or unjust, and denied the legality of said order.

Reference may be made to the following language from the opinion of this Court in the case of I. C. C. vs. Alabama Midland Ry. Co. referred to above:

"Much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be *reviewed* by the Court. The provisions of section 16 of the Act, which authorize the Court to 'proceed to hear and determine *the matter* speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner *as to do justice in the premises*, and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the Court may think needful, to enable it to form *a just judgment in the matter of such petition*,' extend as well to an inquiry or proceeding *under the fourth section* as to those arising under the other sections of the Act."

The italics are mine.

In using the language just quoted, this Court was not discussing the question as to whether the Circuit Court can modify or change an order as made by the Commission; and therefore, it had no idea of disapproving the proposition announced by Judge Severens, and affirmed by the Court of Appeals in the case of I. C. C. vs. D. G. H. & M. Ry. Co. referred to above.

In using the language just quoted from the opinion in the Alabama Midland Ry. case, this Court was merely combatting an argument which had been pressed upon the Court by counsel for the Commission to the effect that, *under the fourth section*, the action of the Commission was conclusive, and could not be reviewed by the courts at all. This Court decided, however, that the power of *review* by the courts extends "as well to an inquiry or proceeding *under the fourth section*, as to those arising under the other sections of the Act."

168 U. S., p. 174.

The power of "*review*" referred to by this Court is confined to a "review" of the question as to whether the order as made by the Commission is lawful. If upon such a "review" the Court finds that the order is lawful, it awards its process to enforce it. If upon such "review" the Court finds that the order as made is not warranted by law, the power and duty of the Court are at an end.

"*The matter*" which the Court is authorized to "*hear and determine*," and "*the premises*" in which the Court is to "*do justice*," and "*the matter of such petition*," in which the Court is "to *form a just judgment*," all mean one and the same thing, viz., "to hear and determine," and "to form a just judgment" on the question whether the order, *as made by the Commission*, *is lawful* or not.

The sixteenth section of the Act to Regulate Commerce provides that whenever any common carrier shall refuse or neglect to perform "any *lawful* order or requirement of the Commission," the Commission, or any one else, may apply to the Circuit Court of the United States, and said Court "shall have power to hear and determine the matter" "speedily as a court of equity," "in such manner as to do justice in the premises." The Court may prosecute all such inquiries as may be needful to enable it "to form a just judgment in the matter of such petition;" and if it be made to appear to such court on such hearing or on report of any such person or persons, that the *lawful* order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction," etc.

It will be seen that the jurisdiction of the Circuit Court, *under section* 16, is confined to the enforcement of a LAWFUL order made by the Commission; and that said court is not authorized to make a new order of its own.

I concede that the Commission may assign an erroneous reason for making an order, and yet the order may, for other reasons, be lawful; and that, in such case, it is the duty of the Court to enforce it; but I contend that the Court has no power to enforce an order of the Commission which is *not lawful*; nor to make an order of its own, under section 16, which is *substantially* different from the order made by the Commission.

Under sections 8 and 9 of the Act to Regulate Commerce, any one who complains that the Act has been violated by a common carrier is given an action for damages in the courts of the United States. But if instead of resorting to those courts he elects to apply to the Commission, as he may do under section 16, he must be prepared to maintain the *lawfulness* of such order as the Commission may make in his behalf; or he cannot demand of the Circuit Court an enforcement of the order.

Section 9 provides that any person shall have the right to pursue his remedy in court, or his remedy before the Commission; but that he shall not have the right to pursue both remedies. According, however, to the contention of counsel for the appellee a party may elect to apply to the Commission, and having obtained an order from it he may, under section 16, apply to the Court for an enforcement of the order; and notwithstanding the Court may be of the opinion that the order of the Commission is unlawful, it is the duty of the Court to give to the party all the relief to which he would have been entitled, if he had, in the first instance, applied to the Court under sections 8 and 9 of the Act. If the contention of counsel be correct, the party, instead of being forced to elect between the Commission and the Court, obtains the advantage of the jurisdiction of the Court, as well as that of the Commission.

In the case at bar, Judge Severens did not hold that the Court had the right to "modify the order of the Commission"

or to make a "new or different order" of its own. Speaking of the order made by the Commission in that case, he said:

"The legal reason given may be wrong and the order right, if, upon the facts, the latter (i. e., the order) should be found by the Court TO BE WARRANTED BY LAW. Nor would it affect the duty of the Court if the Commission had founded its order upon one provision of the Act, and the facts brought the case within some other. THE QUESTION, THEREFORE, IS WHETHER THE ORDER MADE WAS A LAWFUL ONE *in the circumstances as they are made to appear.*"

Trans., p. 370.

In the case just cited, Judge Severens did not "modify the order of the Commission," nor did he make a "new or different order" of his own. On the contrary, he "ordered, adjudged, and decreed that *the order* MADE BY THE INTERSTATE COMMERCE COMMISSION be in all things affirmed and made the order of this Court," etc.

Trans. p. 381.

VII.

COMPETITION BETWEEN MARKETS MAY BE CONSIDERED BY CARRIERS IN ADJUSTING THEIR RATES.

During the oral argument, Mr. Justice White asked me a question, which, as I understood it, was this:

"If there be no competition at Nashville except as between the Louisville & Nashville R. R. Co. and the Nashville, Chattanooga & St. Louis Ry., can the lines operating through Chattanooga, in accepting lower rates to Nashville, take into consideration the fact that the L. & N. R. R. Co. reduced its proportion of the Eastern rates to Nashville merely to enable Nashville to meet the competition of Evansville and Louisville, whose Eastern rates are fixed by the Northern Trunk Lines?"

Or, can the L. & N. R. R. Co. justify the acceptance of exceptionally low rates to a city on its line, when it is not com-

pelled to do so by competition of other carriers at that city, and the sole motive for doing so is to enable that city to compete with other cities located upon other railroads?

As I understand the question, it was involved in the case of L. & N. R. R. Co. vs. Behlmer, 175 U. S., p. —, decided at the present term; and it is whether competition *between markets* can be taken into consideration by carriers in charging less to longer than to shorter distance points.

In the Behlmer case, the Commission and the majority of the Court of Appeals held, in effect, that competition between market and market cannot be considered by carriers as affecting the circumstances and conditions under which transportation is conducted.

But in the case of Texas & Pacific Ry. Co. vs. I. C. C., known as the "Import" case, Mr. Justice Shiras, speaking for this Court, said: "It could not readily be supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, *sources of trade and commerce already existing*, nor to overlook the property rights of those who had invested money in the railroads of the country, *nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation.*"

162 U. S., p. 211.

Nashville is situated on the Cumberland River, which is navigable for nine months in the year by steamboats of as much as three hundred tons burden.

Trans., pp. 49, 409.

While the Commission found that the present Nashville rates are not forced upon the carriers by water competition yet it also found that before railroads were built there were through lines of boats to Nashville from Cincinnati and other cities (Trans., p. 49); and that the amount of such additions to the Trunk Line rates from New York to Cincinnati as are made by the Louisville & Nashville Railroad from Cincinnati to Nashville "was doubtless fixed originally with reference

to the water rates between those cities, and it may be that the possibilities of water carriage have some influence in maintaining the present figures."

Trans., p. 49.

It is manifest that, before railroads were built, Nashville's location on the Cumberland river enabled her to compete with Louisville and Evansville in the territory between the Cumberland and Ohio rivers.

Nashville was, at that time (to use the language of Mr. Justice Shiras), one of the "sources of trade and commerce" for supplying the people who resided in the territory between those rivers; and it was not the intention of Congress "to interfere with and interrupt, much less destroy" Nashville as one of such sources of trade and commerce.

Again: the people or consumers who reside in the territory between those rivers had the benefit of Nashville being one of their "sources of trade and commerce;" and it was not the intention of Congress to disregard the interests of those consumers.

But, if the Act to regulate commerce be so construed as to prohibit the Louisville & Nashville R. R. Co. from accepting such rates on Eastern traffic to Nashville as will enable her to compete in said territory with Louisville and Evansville, the effect of the act will certainly be to "interfere with," "interrupt," and "destroy" Nashville as one of the "sources of trade and commerce" for said territory; and to "disregard the interests of the consumers" in said territory.

The competition between Louisville, Evansville and Nashville in said territory is just as effective, as it would be if all three of them were located upon the same line of railroad.

It is the fact that those cities compete with each other in the same territory that renders it necessary that they shall have such relative rates as will enable each of them to continue to compete. The fact that all of them are served by the same railroad,

or the fact that they are served by different railroads, is wholly immaterial.

The Hudson River Railroad runs up the eastern shore of the Hudson River, from New York to Albany. The West Shore Railroad runs up the western shore of that river, from Jersey City to Albany.

According to the theory of the Commission, and the majority of the Court of Appeals, in the Behlmer case, each road may compete for traffic against other lines on its own side of the river; but neither of them can do anything to promote the traffic upon its own side of the river in competition with the traffic upon the other side of the river. In other words, New York railroads may compete with New York railroads, and Jersey City railroads may compete with Jersey City railroads; but New York railroads must not compete with Jersey City railroads.

Such refinements may be interesting, but they cannot properly find a place in the construction of a statute intended for the practical administration of the most important commercial interests of the country.

It is perfectly obvious that Jersey City must have substantially the same rates as New York to the West, or it will be impossible for Jersey City to compete with New York in the West.

It makes no difference whether the Hudson River Railroad and the West Shore Railroad be (as they once were) owned by different companies, or (as they now are) owned by the same company; in either case Jersey City must have substantially the same rates as New York if Jersey City is to continue to compete with New York.

The Illinois Central R. R. has a line from the Ohio river to New Orleans, but it does not reach Mobile; and the Mobile & Ohio R. R. has a line from the Ohio river to Mobile, but it does not reach New Orleans.

The Illinois Central R. R. is interested in developing the port of New Orleans, while the Mobile & Ohio R. R. is interested in developing the port of Mobile.

It is obvious that Mobile must have substantially the same rates as New Orleans from the West, or there can be no competition between those cities, and, therefore, the competition between them (though they are located upon different railroads) is just as effective as if they were both located on the same railroad.

As a matter of fact, the competition "between market and market" is nothing more than competition between the carriers by which those markets are respectively served.

Markets cannot compete except by means of their respective carriers.

The Commission, itself, admits that "the strife for trade between different markets seeking transportation for *like* commodities to the same localities is undoubtedly *one of the most potent commercial forces of our time.*

4 I. C. Rep., p. 149, left col. Trammell et al. vs. Clyde S. S. Co. et al.

It is judicially known to the Court that Boston, New York, Philadelphia, and Baltimore are competing markets in the East for traffic to and from the West.

For twenty years or more the rates from Boston to Western competitive points have been the same as from New York. From Philadelphia and Baltimore the rates are "agreed differentials"—less than New York—the Baltimore rates being also lower than Philadelphia rates. When the rates from New York to Western points are changed, like changes have to be made from Boston, Philadelphia, and Baltimore; the "differentials" as between the Eastern cities being at all times maintained.

Wholesale Prices, Wages, and Transportation, Senate Rep. No. 1394, 2d Sess., 52d Con. Part 1, pp. 429, 430.

The Commission has recently considered the matter of said differentials on grain, etc., and refused to disturb them.

7 I. C. Rep., p. 613, N. Y. Produce Exchange vs. B. & O. R. R.

It is obvious that Boston, New York, Philadelphia, and Baltimore must have such relative rates to and from the West as will enable them to compete with each other or one or more of them must cease to compete. And it is equally obvious that the necessity for such relative rates is just as great, though the lines serving those cities are owned by different companies, as it would be if all of said lines were owned by one company.

It may be said that if substantial equality of rates be necessary to enable one city to compete with another in common territory, Chattanooga must have substantially the same rates as Nashville to enable Chattanooga to compete in the territory which lies between those cities.

The proposition is self-evident, and is not controverted by me.

The lines which make the rates from the East to Chattanooga have the perfect right to accept such rates as will enable Chattanooga to compete with Nashville in said territory on equal terms, but they are neither legally nor morally bound to exercise the right; especially as it would either give Chattanooga a monopoly of the territory in which the twenty-four Southern cities with which she is grouped are located, or it would necessitate similar reductions to all of those cities, and thus cause a greater loss of revenue than said lines ought to be required to bear.

The lines which make the rates from the East to Chattanooga do not make the rates from the East to Nashville; and the lines which make the rates from the East to Nashville do not make the rates from the East to Chattanooga.

The Chattanooga lines are therefore not to blame for the inequality which exists between the Chattanooga rates and the Nashville rates; and while they have the legal right to remove the inequality the law will not compel them to do so, to their own great detriment.

Chicago ——— N. Y. Central R. R. ——— New York

St. Louis ——— B. & O. R. R. ——— Baltimore

If the New York Central Railroad should put in a line of

rates between Chicago and New York so low as to draw to its road almost the entire volume of the East and West traffic, the Baltimore & Ohio Railroad would have the right to put in a competitive line of rates between St. Louis and Baltimore so as to prevent the New York Central Railroad from securing a monopoly of the East and West traffic; but there is nothing in the Act to Regulate Commerce *which requires the B. & O. R. R. Co. to do so.* It could abandon the competitive traffic to its rival, if it found that it was to its interest to do so.

As said by Mr. Justice Brewer: "Either company may reduce its rates as far as it pleases below what is a reasonable and fair compensation for the service without violating the Act, *and such reduction compels no change by its competitor or any other company.*"

10 U. S. App., 434, Chicago, etc., Ry. Co. vs. Osborne.

Respectfully submitted,

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